

Status Report on FINRA Dispute Resolution Task Force Recommendations

In December 2015, the FINRA Dispute Resolution Task Force (Task Force) issued its Final Report¹ relating to its review of FINRA's dispute resolution forum, which included 51 recommendations. This report discusses the status of FINRA's responses to these recommendations.

As of September 30, 2016, FINRA has formulated responses – detailed below – to many of the Task Force recommendations. In doing so, FINRA has discussed most of the recommendations with the National Arbitration and Mediation Committee (NAMC), FINRA's Board Advisory Committee on the dispute resolution forum, and will discuss the remainder of the recommendations at its next meeting.

The following sets forth FINRA's progress to date.

Recommendations Requiring FINRA Board Approval

The FINRA Board has approved five proposals that address Task Force recommendations.

- **Task Force Recommendation Relating to Arbitrators:** In those instances where all non-public arbitrators are struck from the arbitrator selection process, a new list of ten public arbitrators should be generated for that seat. In that way, selection of the all public panel will be made from lists containing 30 potential arbitrators.²

FINRA staff agreed with the Task Force that it should provide parties with greater choice of public arbitrators in cases with all public panels. However, if FINRA staff waited until the parties collectively struck all the non-public arbitrators from the list before it provided the parties with additional names of public arbitrators, the panel selection process would likely take at least one additional month to complete. Also, FINRA staff was concerned about the additional time and expense the parties would incur in vetting an additional list of 10 public arbitrators. Therefore, in order to address the Task Force's recommendation without delaying the panel selection process, or unduly burdening the parties, FINRA proposed to amend FINRA Rule 12403 of the Code of Arbitration Procedure for Customer Disputes (Customer Code), to increase the number of public arbitrators on the list that FINRA sends parties during the arbitration panel selection process from 10 arbitrators to 15 arbitrators in cases with three arbitrators. The SEC approved the proposed rule change on September 14, 2016.³

- **Task Force Recommendation Relating to Arbitrators:** Monitor the application of the recently adopted definitions of public and non-public arbitrators in light of concerns that individuals with substantial process and subject matter expertise are stricken from the list of public arbitrators.

FINRA is proposing to amend FINRA Rules 12100 and 13100 (Definitions), to revise the non-public arbitrator definition. Specifically, the amendments would provide that a non-

¹ See <http://www.finra.org/arbitration-and-mediation/finra-dispute-resolution-task-force>.

² See Final Report recommendations relating to Arbitrators (No. 6).

³ See Securities Exchange Act Release No. 78836 (September 14, 2016), 81 FR 64564 (September 20, 2016) (Notice of Filing of File No. SR-FINRA-2016-022).

public arbitrator is a person who is otherwise qualified to serve as an arbitrator, and is disqualified from classification as a public arbitrator.

- **Task Force Recommendation Relating to Motions to Dismiss:** Rule 12504(a) should be amended to include one additional category for which motions to dismiss may be made before the conclusion of the case in chief: situations where the dispute has been previously concluded through adjudication or arbitration and memorialized in an order, judgment, award or decision.⁴

FINRA staff agreed with the Task Force and believes that the recommendation should also be applied to intra-industry disputes. Therefore, FINRA is proposing to amend FINRA Rule 12504 of the Customer Code and FINRA Rule 13504 of the Code of Arbitration Procedure for Industry Disputes (Industry Code), to provide that arbitrators may act upon a motion to dismiss a party or claim prior to the conclusion of a party's case in chief if the arbitrators determine that the non-moving party previously brought a claim regarding the same dispute against the same party that was fully and finally adjudicated on the merits and memorialized in an order, judgment, award, or decision. FINRA filed the proposal with the SEC in August 2016.⁵

- **Task Force Recommendation Relating to Expungement:** Review of procedures for notifying state regulators of expungement requests.

FINRA is proposing to amend FINRA Rule 12805 of the Customer Code and FINRA Rule 13805 of the Industry Code, to provide, among other matters, that FINRA will notify the appropriate state securities regulators of all requests for expungement relief.⁶

- **Task Force Recommendation Relating to Case Management:** Amend FINRA Rules 12402 and 12403 to use the first answer due date as opposed to the last answer due date [to determine when to send arbitrator lists to parties].

FINRA staff agreed with the Task Force that it should expedite sending lists of arbitrators to parties. However, using the first answer date to send the lists to parties and their counsel could affect a party's ability to participate in the arbitrator selection process. The staff first learns the identity of a respondent's counsel when the answer is filed with FINRA. If there are multiple respondents, it is not likely that the staff would learn the identity of some respondents' counsel at the time of the first answer due date. If the staff does not know the identity of a respondent's counsel, it would send the lists to the respondent, who may not forward them to his or her counsel. In light of this concern, FINRA is proposing to amend Rules 12402, 12403, and 13403 (Sending Lists to Parties) to provide that the Director of Arbitration will send the list or lists generated by the Neutral List Selection System to all parties at the same time, within approximately 30 days after the last answer is due, regardless of the parties' agreement to extend any answer due date. Parties often extend their opponents' time to answer. The proposal would expedite the process by allowing FINRA to send the lists immediately after the last answer due date.

⁴ See Final Report recommendations relating to Motions to Dismiss (No. 1).

⁵ See Securities Exchange Act Release No. 78553 (August 11, 2016), 81 FR 54888 (August 17, 2016) (Notice of Filing of File No. SR-FINRA-2016-030).

⁶ See Final Report recommendations relating to Expungement (No. 3).

FINRA Office of Dispute Resolution – Enhancements

Many of the recommendations, particularly those involving forum transparency, arbitrator recruitment and training, and case administration processes, did not require rulemaking. FINRA staff took steps to implement these recommendations earlier this year.

Recommendations Relating to Arbitrators

- **Task Force Recommendation:** Continued efforts to develop effective strategies to recruit aggressively applicants for the arbitrator pool, with a view to increasing both the depth and the diversity of the pool, and to monitor the results.

Action Taken: FINRA implemented procedures to recruit additional arbitrators including, but not limited to, hiring additional staff for arbitrator recruitment, retaining a consultant for recruitment advice, expanding the use of social media, and direct marketing.⁷

- **Task Force Recommendation:** Continued review and monitoring of the arbitrator qualification process to ensure that the goals of processing an application within 120 days and training arbitrators within 120 days of approval are achieved.

Action Taken: FINRA established performance criteria to ensure that FINRA reviews arbitrator applications promptly and that newly approved arbitrators receive timely training. FINRA implemented procedures to regularly monitor performance of these measures.⁸

- **Task Force Recommendation:** Continued review of FINRA's website, as well as its recruitment materials, to ensure that they convey a message of inclusiveness and do not discourage from applying qualified and diverse individuals with a variety of educational backgrounds and work experiences.

Action Taken: FINRA revised the recruitment materials on the website to ensure that they convey a message of inclusiveness. The materials now target a broader range of industries from which FINRA welcomes arbitrator applicants.⁹

- **Task Force Recommendation:** All arbitrators should be encouraged to complete continuing education programs on a periodic basis.

Action Taken: FINRA uses *The Neutral Corner* (FINRA's arbitrator and mediator newsletter), monthly emails to neutrals, and the FINRA website to remind arbitrators of training opportunities available at FINRA, including FINRA's free arbitrator training modules and accompanying written training materials, and reduced rate regulatory/compliance training courses. FINRA also makes arbitrators aware of upcoming programs on securities arbitration and mediation provided by bar associations through these vehicles. FINRA staff worked with the American Bar Association and the Practising Law Institute to provide free training or training at a reduced cost to arbitrators.¹⁰

⁷ See Final Report recommendations relating to Arbitrators (No. 3).

⁸ *Id.* (No. 4).

⁹ *Id.* (No. 5).

¹⁰ *Id.* (No. 15).

- **Task Force Recommendation:** Increased training for chairpersons.

Action Taken: FINRA implemented a chairperson mentorship program to facilitate interaction between new chairpersons and experienced chairpersons. In the fall of 2016, FINRA will produce a neutral workshop, which will be available on FINRA’s website for arbitrators to view on demand, focusing on chairperson issues.¹¹

- **Task Force Recommendation:** Develop a procedure for advising arbitrators about a proposed rule change and how they can comment on it, and notifying them of adoption of proposed rule changes.

Action Taken: FINRA implemented procedures for advising arbitrators about a pending proposed rule change and how they can submit comments. Specifically, depending on timing, FINRA will advise arbitrators through: (1) a notice in *The Neutral Corner*; (2) FINRA’s monthly email to neutrals; and (3) the FINRA Office of Dispute Resolution webpage on FINRA’s website. FINRA also set up an RSS feed for arbitrators so they can automatically receive an alert when FINRA updates this portion of the website. FINRA also advises arbitrators about approved rule changes through the vehicles described.¹²

- **Task Force Recommendation:** Arbitrators should be required to update their arbitrator disclosure report promptly to report material new information or a material change in their status, and to review, at least annually, their arbitrator disclosure report and either confirm its accuracy or update it to take account of new information.

Action Taken: FINRA implemented procedures to ensure that arbitrators update their disclosure reports promptly to report material new information. Specifically, FINRA is sending arbitrators a quarterly reminder asking them to review their disclosure reports and revise them as needed. The email also directs arbitrators to certify the accuracy of the information on the reports. In addition, FINRA is working on system changes to add a date field to the disclosure report to indicate when the arbitrator last certified the accuracy of the report.¹³

- **Task Force Recommendation:** The arbitrator disclosure report should add to the existing list of current cases assigned to the arbitrator the name of counsel and city of counsel’s office.

Action Taken: FINRA is in the process of adding a field to the arbitrator disclosure report that identifies the name of counsel and the city of the counsel’s office for each pending case assigned to an arbitrator.¹⁴

¹¹ Id. (No. 17).

¹² Id. (No. 20).

¹³ Id. (No. 9).

¹⁴ Id. (No. 10).

Recommendations Relating to Case Management Procedures

- **Task Force Recommendation:** Review of procedures to encourage expeditious scheduling of hearings.

Action Taken: FINRA implemented procedures to increase the efficiency of administering Simplified Arbitration cases including, among other things, sending the arbitrator's oath and the pleadings to the arbitrator earlier in the process, and using management reports to track and speed up the resolution of motions.¹⁵ As of August 2016, case turnaround time decreased 10 percent from 2015.¹⁶

- **Task Force Recommendation:** Revise the Initial Prehearing Conference (IPHC) script to make clear that the parties may agree to modify hearing procedures, including the use of any type of technology, in the interest of efficiency and cost-effectiveness, subject to the arbitrators' discretion for good cause.

Action Taken: FINRA revised its IPHC Script to state that the parties are encouraged to use technology to facilitate hearings. The script also provides that parties may agree to modify hearing procedures by using technology that promotes efficiency and cost-effectiveness (e.g., videoconferencing and electronic exhibits), subject to the arbitrators' approval.¹⁷

- **Task Force Recommendation:** Adding language to the IPHC script to strongly discourage the practice of phantom retention of experts.

Action Taken: FINRA revised its IPHC script and form letters to state that a party should only identify the name of an expert witness that the party has actually retained.¹⁸ FINRA also included an article in *The Neutral Corner* on the topic of identifying expert witnesses.¹⁹

- **Task Force Recommendation:** With respect to expedited hearings for senior and seriously ill parties, implementing procedures to insure that once the expedited process is selected, the goals of achieving an expedited process and hearing are achieved.

Action Taken: FINRA implemented procedures to increase the efficiency of administering expedited cases concerning senior and seriously ill parties. Among other things, FINRA: (1) reduced the time staff takes to send arbitrator lists to the parties after the answer is due; (2) reduced the time that arbitrators have to accept such cases; (3) updated management tracking reports to note expedited cases; and (4) sends a checklist to parties asking them to stipulate to a number of steps that will reduce the time it takes FINRA to administer a case (e.g., agreeing to reduce the number of days to return arbitrator rankings to FINRA).²⁰ FINRA also published an article in *The Neutral Corner* on the topic of expedited cases for senior and seriously ill parties.²¹

¹⁵ See Final Report recommendations relating to Case Management – Procedural Issues (No. 1).

¹⁶ See <http://www.finra.org/arbitration-and-mediation/dispute-resolution-statistics>.

¹⁷ See Final Report recommendations relating to Case Management – Procedural Issues (No. 7).
¹⁸ *Id.* (No. 9).

¹⁹ See http://www.finra.org/sites/default/files/The_Neutral_Corner_Volume_2_2016.pdf.

²⁰ See Final Report recommendations relating to Case Management – Procedural Issues (No. 2).

²¹ See http://www.finra.org/sites/default/files/The_Neutral_Corner_Volume_2_2016.pdf.

- **Task Force Recommendation:** Take steps to emphasize to arbitrators the need to avoid late recusals and the perceived problem of double-booking.

Action Taken: FINRA published an article in *The Neutral Corner* on avoiding late arbitrator recusals.²² FINRA programmed enhancements to its case management system that allow staff to track late recusals and has created a report that managers can generate from the system to monitor the issue. Staff intends to develop additional steps to reduce late recusals.²³

- **Task Force Recommendation:** Develop a feature on the party portal which allows a party to view all costs on an on-going basis.

Action Taken: FINRA staff is programming system changes to the Dispute Resolution Party Portal which will allow parties to view costs accrued in a case on an on-going basis. In the interim, if a party has questions about fees accrued, FINRA staff sends the party a fee summary.²⁴

Recommendations Relating to Transparency

- **Task Force Recommendation:** FINRA should adopt a policy of promoting, to the maximum extent possible, transparency about its dispute resolution forum.

Action Taken: FINRA expanded the statistics updated monthly on the FINRA website and updated charts to display case filing volume for the 15 most popular controversy and security types over a five-year period. The information is further distinguished between customer cases and intra-industry cases. FINRA added a map that provides the number of cases and arbitrators (by type) in each arbitration hearing location.²⁵

- **Task Force Recommendation:** FINRA should reinstate its prior practice of disclosing on its website the names of NAMC members.

Action Taken: FINRA published the names and affiliations of the members of the NAMC on FINRA's website.²⁶

Recommendation Relating to Mediation

- **Task Force Recommendation:** Aggressive efforts to recruit, train, and encourage the use of more diverse mediators.

Action Taken: FINRA eliminated the annual fee that mediators remit to remain eligible to serve as FINRA mediators in order to recruit and retain diversity in FINRA's mediator roster.²⁷

²² See Final Report recommendations relating to Case Management – Procedural Issues (No. 4).

See http://www.finra.org/sites/default/files/The_Neutral_Corner_Volume_1_2016_0.pdf.

²³ See Final Report recommendations relating to Case Management – Procedural Issues (No. 5).

²⁴ *Id.* (No. 8).

²⁵ See Final Report recommendations relating to Transparency (No. 1).

²⁶ *Id.* (No. 2), and see <http://www.finra.org/arbitration-and-mediation/national-arbitration-and-mediation-committee-namc>.

²⁷ See Final Report recommendations relating to Mediation (No. 6).

Next Steps

FINRA staff will continue working on recommendations related to new staff procedures, technology enhancements, and rulemaking, and provide periodic updates on its progress going forward.